[HIGH COURT OF AUSTRALIA.]

THE CITIZENS AND GRAZIERS' LIFE ASSURANCE COMPANY LIMITED . . APPELLANT;
DEFENDANT,

AND

THE COMMONWEALTH LIFE (AMALGAMATED) ASSURANCES LIMITED AND ANOTHER . . . . . RESPONDENTS.
PLAINTIFF AND DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1934.

SYDNEY, *April* 4-6, 9-10; *Aug.* 2.

Gavan Duffy C.J., Rich, Starke, Dixon, and McTiernan JJ.

Company—Amalgamation—Sale of businesses of two companies to new company—Part of one company's business excluded—Agreement under seal—Uncalled capital of old companies—Provision that new company may require call to be made thereon, and payment over of proceeds—Validity—Business of life assurance—Statutory restriction—The Life Assurance Companies Act 1901 (*Q.*) (1 *Edw. VII., No.* 20), *secs.* 4, 7A, 30 (1), (5), (6)*—*The Insurance Act* 1923 (*Q.*) (14 *Geo. V., No.* 29), *sec.* 2 (2)*.

The objects of the A Co. included powers to sell, dispose of, or otherwise deal with, all or any of its property; to sell any of its real or personal estate or property and its undertaking or any part thereof for such consideration as it thought fit, and in particular for shares in any other company having similar objects; to amalgamate with any other company having objects

* *The Life Assurance Companies Act* 1901 (Q.) provides:—By sec. 4:—"In this Act, unless the context otherwise indicates, the following terms have the meanings set against them respectively, that is to say:— . . . 'Company'—Any person, or persons, corporate or unincorporate . . . who issues or issue or is or are liable under policies of assurance upon human life in Queensland." By sec. 30:—"(1) When it is intended to amalgamate two or more companies, or to transfer the life assurance business of one company to another company, the directors of any one or more of such companies may apply to the Court by petition to sanction the proposed arrangement. . . . (5) No company shall amalgamate with another company, or transfer its business to another company, unless such amalgamation or transfer is sanctioned by the Court in accordance with this section. (6) This section shall not apply to any case in which the business of any company which is sought to be

altogether or in part similar, and to do all such other acts and things as might be incidental or conducive to the attainment of the objects of the company. The A Co. and the B Co., both incorporated in New South Wales, carried on the business of life assurance in various States, including, in the case of the A Co., Queensland. In 1926 the companies agreed to sell all their assets, businesses and undertakings, as going concerns, to the C Co. The sale price was to be applied in taking up shares in the C Co. The A Co.'s life assurance business was excepted from this transaction, and was to remain under the control of that company, though for a further consideration the C Co. was to receive the net profits. The agreement provided that the C Co. could from time to time require the A Co. and the B Co. to make calls on their respective uncalled capital, and to pay the proceeds to the C Co. in return for shares in that company. The C Co. did not carry on any life assurance business in Queensland, and the sanction of the Supreme Court of Queensland to the transaction was not obtained. The A Co., having made a call on its uncalled capital as required by the C Co., refused to pay over the proceeds, or to make a further call, and resisted a suit by the C Co. for specific performance of the provisions of the agreement relating to calls, on the grounds that such an agreement was *ultra vires* the A Co., and was illegal or unenforceable because the sanction of the Court had not been obtained under sec. 30 (5) of *The Life Assurance Companies Act* 1901 (Q.).

Held :—

(1) By the whole Court, that the transaction could not be affected by sec. 30 (5) of *The Life Assurance Companies Act* 1901, because the C Co., having never issued, and not being liable under, any policies of assurance upon human life within Queensland, was not within the terms of that sub-section.

(2) By the whole Court, that the transaction, so far as it related to uncalled capital was not within the powers of the A Co. to dispose of its property or undertaking.

(3) By *Rich*, *Dixon* and *McTiernan* JJ. (*Gavan Duffy* C.J. and *Starke* J. dissenting), that the transaction was not an amalgamation within the object of the A Co. which enabled it to amalgamate with other companies, and, therefore, the suit for specific performance should be dismissed.

Decision of the Supreme Court of New South Wales (*Harvey* C.J. in Eq.), reversed.

amalgamated or transferred does not comprise the business of life assurance." By sec. 7A, inserted by sec. 2 (2) of *The Insurance Act* 1923 (Q.) :—"(1) From and after the date of the passing of '*The Insurance Act of* 1923' no company shall commence to transact life assurance business within Queensland or carry on such business within Queensland unless such company is a company in which the net profits from time to time earned by the company are by the constitution of the company exclusively divisible amongst the policy holders of the company. This sub-section does not apply to any company carrying on life assurance business within Queensland at the date of the passing of the said Act. . . . (2) . . . from and after the date of the passing of '*The Insurance Act of* 1923' no company shall commence to transact or shall carry on life assurance business within Queensland unless or until such company has received from the Treasurer a licence . . . to carry on life assurance business within Queensland."

H. C. OF A. 1934.

CITIZENS AND GRAZIERS' LIFE ASSURANCE CO. LTD. v. COMMONWEALTH LIFE (AMALGAMATED) ASSURANCES LTD.

APPEAL from the Supreme Court of New South Wales.

A suit was brought in the Supreme Court of New South Wales in its equitable jurisdiction by The Commonwealth Life (Amalgamated) Assurances Ltd. against The Commonwealth Life Assurance Society Ltd. and The Citizens and Graziers' Life Assurance Co. Ltd., in which the statement of claim was substantially as follows :—

1. The plaintiff and each of the defendants are companies duly incorporated according to the laws of the State of New South Wales with power to sue and be sued in their respective corporate names.

2. By an agreement in writing made 14th December 1926 between the plaintiff (therein called the company) of the third part, the defendant The Commonwealth Life Assurance Society Ltd. (therein called the covenantor) of the first part and the defendant The Citizens and Graziers' Life Assurance Co. Ltd. (therein called the covenantee) of the second part, the covenantor and covenantee agreed to sell and dispose of their respective insurance businesses to the plaintiff upon the terms and conditions therein mentioned.

3. Clause 1 of the agreement is in the words following :—" There shall be excepted from the sale purchase and taking over hereinafter provided for so much of the assets business and undertaking (including goodwill) in the State of Queensland of the covenantee as now or hereafter form part of or relate to its life assurance fund and operations in that State, or are or will be otherwise subject to the Acts of Parliament of that State dealing with life assurance and the life assurance business in that State of the covenantee shall at all times continue to be carried on by the covenantee under its sole control as heretofore, and as if this agreement had not been made and the company shall not so long as the present life assurance Acts of Queensland remain in operation commence to transact life assurance business within that State or carry on such business within that State and this agreement shall in all respects be read and construed so as to give full force and effect to this clause and where necessary for that purpose the following clauses of this agreement shall be deemed to be subject thereto."

4. Clause 2 of the agreement is in the words and figures following : —" Subject as aforesaid the covenantor and the covenantee hereby sell and the company hereby purchases and takes over the assets

business and undertakings (including goodwill) of the covenantor and the covenantee respectively both present and future as going concerns as from thirtieth day of September One thousand nine hundred and twenty-six and hereby assumes the liabilities of the covenantor and covenantee respectively as hereinafter appears and the company hereby indemnifies the covenantor and covenantee respectively from all claims and demands whatsoever on each and every policy or policies of life endowment, industrial or accident and other policies of assurance or assurances written by the covenantor and/or covenantee either prior to this agreement or at any time hereafter before the company shall actually have taken over and commenced business or in respect of which the covenantor and/or the covenantee shall have written the business as agents or agent for and at the request of the company."

5. Part of clause 11 of the agreement is in the words and figures following :—" Subject as aforesaid the covenantor and covenantee shall respectively take all necessary steps to properly transfer and assign all the assets and business of the covenantor and the covenantee to the company which the company may require in its name other than the uncalled capital of the covenantor and covenantee respectively."

6. Clause 15 of the agreement is in the words and figures following : —" The board of directors of the company shall be at liberty from time to time as they may consider necessary to call on the covenantor and covenantee respectively to make such call or calls on its uncalled capital respectively as may be determined and the total net sums so realized shall be transferred by the covenantor and the covenantee respectively to the company and the company shall issue fully paid One pound shares for all moneys so received by it to the covenantor and/or covenantee respectively therefor provided always that until the total uncalled capital has been fully called up of the covenantor and/or covenantee respectively the calls made on the respective shareholders of the covenantor and covenantee shall be of the same amount."

7. Clause 19 of the agreement is in the words and figures following : —" In the event of its hereafter becoming lawful for a non-mutual life assurance company to commence to transact life assurance

H. C. OF A. 1934.

CITIZENS AND GRAZIERS' LIFE ASSURANCE CO. LTD. v. COMMONWEALTH LIFE (AMALGAMATED) ASSURANCES LTD.

business within Queensland or to carry on such business within that State the company shall have the right by notice in writing to the covenantee to exercise the option of purchasing and taking over the life assurance assets business and undertaking (including goodwill) in the State of Queensland of the covenantee which are under clause one hereof excepted from the present sale purchase and taking over at a price equal to the sum fixed under clause six hereof together with a sum equal to the amount at any time received for any call or calls made by the covenantee in respect to the covenantee's life assurance business in Queensland up to the time of such option being exercised by the company and any expenses of and incidental to such call or calls and together with one hundred fully paid one pound shares of the company, and upon such option being exercised the shares referred to in clause six shall become the absolute property of the covenantee and shall be dealt with as it directs. The covenantee shall apply for shares of one pound each in the company in respect of the moneys so paid by the company to it under this clause and such moneys together with the shares allotted under clause six and together with the said one hundred fully paid one pound shares shall be accepted by the covenantee in satisfaction of the purchase price under the said option."

8. Pursuant to the agreement and not otherwise the assets, business and undertakings of the covenantor and covenantee therein mentioned, other than the assets, business and undertakings of the covenantee mentioned in clause 1 thereof, were transferred and assigned to the plaintiff upon the terms and conditions therein mentioned.

9. The plaintiff has always been ready and willing to perform and has always performed the agreement on its part, and is ready and able and willing and hereby offers to perform the agreement on its part so far as the same remains to be performed by it, and all things have happened and all times have elapsed and all conditions have been fulfilled necessary to entitle the plaintiff to have the agreement performed by the defendants on their part, and to maintain this suit for the breaches of the said agreement by the defendant The Citizens and Graziers' Life Assurance Co. Ltd. hereinafter alleged.

10. On or about 3rd November 1930 the board of directors of the plaintiff passed the following resolution :—" That the said Commonwealth Life Assurance Society Limited and The Citizens and Graziers' Life Assurance Company Limited be called on to make a call of one shilling (1s.) per share on its uncalled capital, respectively, and that the common seal of the company be affixed to the formal call addressed to the said The Commonwealth Life Assurance Society Limited and The Citizens and Graziers' Life Assurance Company Limited, and prepared by the solicitors of the company."

11. On or about 3rd November 1930 documents under the seal of the plaintiff were duly executed in the words and figures following : —" To The Commonwealth Life Assurance Society Limited and The Citizens and Graziers' Life Assurance Company Limited Whereas by agreement made on the fourteenth day of December, One thousand nine hundred and twenty-six between the Commonwealth Life Assurance Society Limited of the first part Citizens and Graziers' Life Assurance Company Limited of the second part and The Commonwealth Life (Amalgamated) Assurances Limited of the third part it was (*inter alia*) provided that the board of directors of the Commonwealth Life (Amalgamated) Assurances Limited should be at liberty from time to time as they might consider necessary to call on The Commonwealth Life Assurance Society Limited and Citizens and Graziers' Life Assurance Company Limited respectively to make such call or calls on its uncalled capital respectively as might be determined and the total net sum so realized should be transferred by The Commonwealth Life Assurance Society Limited and Citizens and Graziers' Life Assurance Company Limited respectively to The Commonwealth Life (Amalgamated) Assurances Limited and The Commonwealth Life (Amalgamated) Assurances Limited should issue fully paid £1 shares for all moneys so received by it to The Commonwealth Life Assurance Society Limited and/or Citizens and Graziers' Life Assurance Company Limited respectively therefor and it was provided that until the total uncalled capital had been fully called up of The Commonwealth Life Assurance Society Limited and/or Citizens and Graziers' Life Assurance Company Limited respectively the calls made on the respective shareholders of The Commonwealth Life Assurance Society Limited and Citizens and

H. C. OF A. 1934.

CITIZENS AND GRAZIERS' LIFE ASSURANCE CO. LTD. v. COMMONWEALTH LIFE (AMALGAMATED) ASSURANCES LTD.

Graziers' Life Assurance Company Limited should be of the same amount Now in exercise of such power and liberty as aforesaid the Board of Directors of The Commonwealth Life (Amalgamated) Assurances Limited now calls on the said The Commonwealth Life Assurance Society Limited and Citizens and Graziers' Life Assurance Company Limited respectively to make a call of one shilling per share on its uncalled capital respectively In witness whereof the Common Seal of the said The Commonwealth Life (Amalgamated) Assurances Limited has been hereunto affixed this third day of November, One thousand nine hundred and thirty. The common seal of The Commonwealth Life (Amalgamated) Assurances Limited was hereto affixed in pursuance of a resolution of the board of directors in the presence of" four directors and the secretary, who respectively appended their signatures thereto, and on or about 4th November 1930 one of the documents was duly handed to each of the defendants accompanied by a notice, signed by the secretary, which, omitting formal parts, was in the words and figures following :—" Notice of Call.—Following the interim notice given by letter of the 22nd August 1930, of probable intention to give notice of call on behalf of the above company, I am directed to intimate that a further resolution was passed at a board meeting held on 3rd instant, and formal notice of call, under seal, is hereby handed to you."

12. Pursuant to the resolution, call and notice and not otherwise, on or about 5th March 1931 the defendant The Citizens and Graziers' Life Assurance Co. Ltd. made a call of 1s. per share on its shareholders, and the shareholders have long since paid the call moneys or a large part thereof to the defendant, but the defendant in breach of the agreement has neglected and refused to pay the net amount of the call moneys to the plaintiff, although the plaintiff has frequently requested the defendant to do so.

13. On or about 11th July 1932 the board of directors of the plaintiff passed a resolution in the words and figures following :—" That, in order to make partial provision for the actuarial deficit disclosed by the recent valuation of this company's policy liabilities, viz., Sixty thousand six hundred and sixty pounds (£60,660), the

company now call on the subsidiary companies, viz., The Commonwealth Life Assurance Society Limited and The Citizens and Graziers' Life Assurance Company Limited, to each make a call of one shilling (1s.) per share, to provide towards such deficiency in the assurance fund."

14. On or about 16th July 1932 documents under the seal of the plaintiff were duly executed in the words and figures following :— "To The Commonwealth Life Assurance Society Limited and The Citizens and Graziers' Life Assurance Company Limited Whereas by agreement made on the fourteenth day of December One thousand nine hundred and twenty-six between The Commonwealth Life Assurance Society Limited of the first part The Citizens and Graziers' Life Assurance Company Limited of the second part and The Commonwealth Life (Amalgamated) Assurances Limited of the third part it was (*inter alia*) provided that the board of directors of The Commonwealth Life (Amalgamated) Assurances Limited should be at liberty from time to time as they might consider necessary to call on The Commonwealth Life Assurance Society Limited and The Citizens and Graziers' Life Assurance Company Limited respectively to make such call or calls on its uncalled capital respectively as might be determined and the total net sum so realised should be transferred by The Commonwealth Life Assurance Society Limited and The Citizens and Graziers' Life Assurance Company Limited respectively to The Commonwealth Life (Amalgamated) Assurances Limited and The Commonwealth Life (Amalgamated) Assurances Limited should issue fully paid £1 shares for all moneys so received by it to The Commonwealth Life Assurance Society Limited and/or The Citizens and Graziers' Life Assurance Company Limited respectively therefor and it was provided that until the total uncalled capital had been fully called up of The Commonwealth Life Assurance Society Limited and/or The Citizens and Graziers' Life Assurance Company Limited respectively the calls made on the respective shareholders of The Commonwealth Life Assurance Society Limited and The Citizens and Graziers' Life Assurance Company Limited should be of the same amount Now in exercise of such power and liberty as aforesaid the board of directors of The Commonwealth Life (Amalgamated) Assurances Limited now calls on the said The Commonwealth Life

H. C. OF A. 1934.

CITIZENS AND GRAZIERS' LIFE ASSURANCE CO. LTD. v. COMMONWEALTH LIFE (AMALGAMATED) ASSURANCES LTD.

Assurance Society Limited and The Citizens and Graziers' Life Assurance Company Limited respectively to make a call of one shilling per share on its uncalled capital respectively. In witness whereof the common seal of the said The Commonwealth Life (Amalgamated) Assurances Limited has been hereunto affixed this sixteenth day of July One thousand nine hundred and thirty-two," and on or about that date one of the documents, signed by the general secretary, was duly handed to each of the defendants accompanied by a notice which, omitting formal parts, was in the words and figures following :—" Dear Sir,—I am to inform you that at a board meeting held by the directors of this company on the 11th instant, the following resolution was passed, and that my board desired me to convey the purport of the resolution to you forthwith : Resolution : It was resolved : ' That, in order to make partial provision for the actuarial deficit disclosed by the recent valuation of this company's policy liabilities, viz. : Sixty thousand, six hundred and sixty pounds (£60,660), the company now call on the subsidiary Companies, viz., The Commonwealth Life Assurance Society Limited and The Citizens and Graziers' Life Assurance Company Limited, to each make a call of one shilling (1s.) per share, to provide towards such deficiency in the assurance fund. In accordance with such resolution, notice of call, under seal, is hereby handed to you."

15. The defendant The Citizens and Graziers' Life Assurance Co. Ltd. in breach of the agreement has neglected and refused to make a call pursuant to the last-mentioned resolution, call and notice, although the plaintiff has frequently requested the said defendant to do so, and although the said defendant has sufficient uncalled capital to make the call.

The plaintiff claimed (*a*) that it be declared that the agreement ought to be specifically performed and that it be ordered and adjudged accordingly ; (*b*) that The Citizens and Graziers' Life Assurance Co. Ltd. be ordered within a time to be fixed by the Court to pay the net amount of the call moneys received by it as mentioned in par. 12 of the statement of claim to the plaintiff ; (*c*) that if necessary it be referred to the Master in Equity to inquire and take account of and ascertain the net amount of those call moneys ; and (*d*) that the Citizens and Graziers' Life Assurance Co. Ltd. be ordered to make

a call of 1s. per share on its shareholders pursuant to the resolution and notice mentioned in par. 14 of the statement of claim, and to pay the net amount of the call moneys when received by it from its shareholders to the plaintiff, in each case within a time to be fixed by the Court.

In its defence the defendant The Citizens and Graziers' Life Assurance Co. Ltd. (*a*) submitted that the agreement of 14th December 1926 was *ultra vires* its own memorandum and/or articles of association and those of the plaintiff, and that the resolution referred to in par. 10 of the statement of claim was *ultra vires* the memorandum and articles of association of the plaintiff; (*b*) refused to admit the allegations contained in pars. 3-11, 13 and 14 of the statement of claim; (*c*) admitted in answer to par. 12 of the statement of claim that on 5th March 1931 it made a call of 1s. per share on its shareholders, that a large part of the call had been received by it, and that it had not paid the net amount of the call to the plaintiff company but had paid and applied the money in connection with its life assurance business in Queensland referred to in par. 3 of the statement of claim; and (*d*) admitted that it had not made the call referred to in par. 15 of the statement of claim and submitted that it was not liable to do so because the before-mentioned agreement was *ultra vires* and void. In further answer to the statement of claim this defendant said (*a*) that at all times material it had carried on the business of life assurance in Queensland, and submitted that it should not be called upon to hand over any portion of its capital until provision had been made for its liabilities in connection with that business; (*b*) that the policies taken out in this defendant company were taken out on the faith of the representation that its capital, including its uncalled capital, was and would be available to satisfy any liabilities of the company to the policy holders; (*c*) that the net profits of the plaintiff company were not exclusively divisible amongst its policy holders, nor had it received a licence from the Queensland Treasurer as mentioned in sec. 2 (2) of *The Insurance Act* 1923 of Queensland; and (*d*) that if the agreement had been rightly interpreted by the plaintiff, it was contrary to the public policy of Queensland and, therefore, should not be enforced by the Court.

H. C. OF A. 1934.

CITIZENS AND GRAZIERS' LIFE ASSURANCE CO. LTD. v. COMMONWEALTH LIFE (AMALGAMATED) ASSURANCES LTD.

Relevant objects of the Citizens and Graziers' Life Assurance Co. Ltd. are shown in the judgments of *Starke* J. and *Dixon* J. hereunder. Another object was as follows :—" (*aaa*) To borrow, raise or secure payment of money in such manner as the company shall think fit, and in particular by the issue of debentures or debenture stock, perpetual or otherwise, charged upon all or any of the company's property both present and future, including its uncalled capital." A special resolution passed in April 1926, and duly confirmed in May 1926, was in these terms :—" That the directors be and they are hereby authorized to enter into and from time to time vary any arrangement which they may deem expedient for the purpose of amalgamating this company with any other company or companies they may deem it desirable to amalgamate with, and to arrange for the transfer of the undertaking and assets of this company in such manner as they deem best in the interests of the shareholders of this company, provided that this company shall obtain interests in the amalgamated undertaking in proportion to the assets transferred." Among the company's articles of association were the following :— " 19. The directors may from time to time make such calls as they think fit upon the members in respect of all moneys unpaid on the shares held by them respectively . . . and each member shall pay the amount of every call so made on him to the person and at the time and places appointed by the directors." " 121. The management of the business of the company shall be vested in the directors, who, in addition to the powers and authorities by these presents or otherwise expressly conferred upon them, may exercise all such powers and do all such acts and things as may be exercised or done by the company, and are not hereby or by statute expressly directed or required to be exercised or done by the company in general meeting, but subject nevertheless to the provisions of the statutes and of these presents, and to any regulations from time to time made by the company in general meeting."

The defendant The Commonwealth Life Assurance Society Ltd. entered an appearance and submitted to such decree or order as the Court thought fit to make.

Harvey C.J. in Eq. made a decree declaring that the Citizens and Graziers' Life Assurance Co. Ltd. was bound to pay to the plaintiff,

in return for fully paid shares of the same face value, an amount equal to the net amount realized for the call made, and to make a further call of 1s. upon its contributing shares, and to pay over the net proceeds, and ordering payment of the net amount of the first call already received or afterwards received.

From this decision the Citizens and Graziers' Life Assurance Co. Ltd. now appealed to the High Court.

Other material facts appear in the judgments of *Starke* J. and *Dixon* J. hereunder.

Sir *Thomas Bavin* K.C. (with him *R. K. Manning*), for the appellant. The agreement was *ultra vires* the appellant company. It cannot be carried out without committing a breach of the law of Queensland: therefore the Court below was in error in ordering it to be specifically performed. The consent of the Court of Queensland to the amalgamation, as required by sec. 30 of *The Life Assurance Companies Act* 1901 of Queensland, was not obtained. The transaction as evidenced by clause 15 of the agreement was not an amalgamation, but was substantially a transfer of the whole of the appellant company's business, other than its life assurance business in Queensland, to The Commonwealth Life (Amalgamated) Assurances Ltd. in return for shares in the latter company. Also each company concerned retained its separate existence as to part of its business. "Sale" is an apt term having regard to the words used in clause 2 of the agreement. The directors of the appellant company were not authorized by its articles to part with its power to call up capital for the purpose of meeting liabilities in Queensland, or to part with their discretion. Although by art. 59 an express power is given to the directors to borrow on the security of uncalled capital, no power was conferred upon them of selling the uncalled capital, or doing what they purported to do under clause 15. What constitutes an amalgamation is shown in *In re South African Supply and Cold Storage Co.* (1). If this arrangement is an amalgamation, it is an amalgamation to carry on business in Queensland, which would be contrary to sec. 30 (5) of the *Life Assurance Companies Act* 1901 of that State. It is impossible to distinguish or differentiate between assets in Queensland and assets in the other States.

(1) (1904) 2 Ch. 268, at p. 287.

H. C. OF A. 1934.

CITIZENS AND GRAZIERS' LIFE ASSURANCE CO. LTD. v. COMMONWEALTH LIFE (AMALGAMATED) ASSURANCES LTD.

[*Weston* K.C. This point was not taken in the Court below. There is no evidence that the company carried on life assurance business as aimed at by the Queensland Act, and in fact it never did carry on such business.]

The position is that the appellant company did, but the Commonwealth Life Assurance Society did not, issue life assurance policies in Queensland. The amalgamated company has not carried on business of this description in that State. Clause 15 of the agreement gives in effect to the amalgamated company an option over the uncalled capital of the appellant company in return for a promise on the part of the latter to take shares in the former at par value whenever the option is exercised. Obviously if the shares increase in value the option will not be exercised, but if the shares decrease in value then presumably the option will be exercised. The shareholders of the appellant company will be liable at any time to pay the whole amount of the uncalled capital. *New Zealand Gold Extraction Co.* (*Newbery-Vautin Process*) v. *Peacock* (1) is distinguishable because the arrangement was different from the arrangement in this case, and the steps taken by the directors of the company concerned in that case were not taken in this case. The method by which the transaction was carried out was contrary to the objects of the appellant company. The Court will require very clear words to show that the appellant has power to sell its uncalled capital, that is, a power to sell property which does not belong to it; a power much greater than a power to charge that property (*Bank of South Australia* v. *Abrahams* (2)).

[*Weston* K.C. referred to *Newton* v. *Debenture Holders and Liquidators of the Anglo-Australian Investment, Finance and Land Co.* (3).]

A power which, if exercised, would have the effect of altering the amount of uncalled capital must be conferred by clear and apt words, or by the necessary context; otherwise a person relying upon the information as to uncalled capital contained in the register compiled by and kept at the office of the Registrar as required by the *Companies Act* of New South Wales, may be prejudiced. Here

(1) (1894) 1 Q.B. 622.
(2) (1875) L.R. 6 P.C. 265, at p. 271.
(3) (1895) A.C. 244.

there are no clear or apt words, and the context does not indicate the conferring of such a power. There is a distinction between calling up the uncalled capital of a company in liquidation, and that of a company which is a going concern (*In re Pyle Works* (1); see also *The Annual Practice* (1933), p. 2563).

[STARKE J. referred to *Re Westminster Syndicate Ltd.* (2).]

The distinction between proceedings before and after liquidation is shown in *Fowler* v. *Broad's Patent Night Light Co.* (3). Uncalled capital is not "property or funds" (*In re British Provident Life and Fire Assurance Society*; *Stanley's Case* (4); *Bank of South Australia* v. *Abrahams* (5)), nor "property" (*In re Russian Spratts Patent Ltd.*; *Johnson* v. *Russian Spratts Patent Ltd.* (6)), nor part of the "undertaking" (*King* v. *Marshall* (7); *New Zealand Gold Extraction Co.* (*Newbery-Vautin Process*) v. *Peacock* (8)), nor "property and undertaking" (*In re Streatham and General Estates Co.* (9)), nor "undertaking and property and receipts and revenue" (*In re Marine Mansions Co.* (10)), nor "real and personal estate" (*In re Colonial Trusts Corporation*; *Ex parte Bradshaw* (11)).

[STARKE J. referred to *Irvine* v. *Union Bank of Australia* (12), *Jackson* v. *Rainford Coal Co.* (13), *In re Pyle Works* (14), and *Palmer's Company Law*, 11th ed. (1921), p. 280.]

The cases on this point are collected and dealt with in *Palmer's Company Precedents*, 13th ed. (1927), vol. III., pp. 58, 59, *Coote* on *Mortgages*, 9th ed. (1927), pp. 511, 512, and *Buckley* on *The Companies Acts*, 11th ed. (1930), pp. 179, 180, and not one case is cited to the contrary of the proposition now put to the Court. The omission to include in its power of sale any reference to uncalled capital should be construed as a prohibition against the sale of uncalled capital (*Newton* v. *Debenture Holders and Liquidators of the Anglo-Australian Investment, Finance and Land Co.* (15)). The general power can be exercised only in matters incidental to the carrying out of objects expressly authorized, and not to the doing of something

(1) (1889) 44 Ch. 534, at p. 575.
(2) (1908) 99 L.T. 924.
(3) (1893) 1 Ch. 724.
(4) (1864) 4 DeG. J. & S. 407; 46 E.R. 976.
(5) (1875) L.R. 6 P.C. 265.
(6) (1898) 2 Ch. 149.
(7) (1864) 33 Beav. 565; 55 E.R. 488.
(8) (1894) 1 Q.B., at p. 632.
(9) (1897) 1 Ch. 15.
(10) (1867) L.R. 4 Eq. 601.
(11) (1879) 15 Ch. D. 465.
(12) (1877) 2 App. Cas. 366.
(13) (1896) 2 Ch. 340.
(14) (1890) 44 Ch. D. 534.
(15) (1895) A.C. 244.

H. C. OF A. 1934.

CITIZENS AND GRAZIERS' LIFE ASSURANCE CO. LTD. v. COMMONWEALTH LIFE (AMALGAMATED) ASSURANCES LTD.

which is impliedly prohibited. The power to amalgamate must be read in conjunction with other powers, and it cannot exceed powers expressly conferred. In the absence of a clause in the appellant company's memorandum to that effect, the clauses therein should not be interpreted independently of one another. The power to amalgamate and the power to deal with uncalled capital must be exercised in accordance with the articles. If the agreement is given effect to it would constitute a variation between the company and its shareholders.

[STARKE J. referred to *Clinch* v. *Financial Corporation* (1), and *Palmer's Company Precedents*, 13th ed. (1927), Part II., pp. 1048, 1049.]

The arrangement here was not an amalgamation either in fact or in law. The purpose of the agreement was to avoid an amalgamation.

[DIXON J. referred to *Brice* on *Ultra Vires*, 3rd ed. (1893), pp. 157, 516 *et seq.*]

So far as the Queensland business is concerned the companies are functioning independently as before the agreement. The power of amalgamation can be exercised only by a complete amalgamation; a partial amalgamation, as here, is not authorized and is an improper use of the power.

[STARKE J. referred to *Wall* v. *London and Northern Assets Corporation* (2) and *In re South African Supply and Cold Storage Co.* (3).]

No mention of amalgamation is made in the agreement. It recites precisely what the companies were proposing to do. Amalgamation is limited to cases where shareholders in the amalgamating companies assume liabilities in the new company (*Halsbury's Laws of England*, 2nd ed., vol. v., p. 790). That is not the case here. If it is an amalgamation under the power to amalgamate, that power must be exercised in conjunction with the power of sale, and if part of the arrangement is a sale of assets, that sale can take place only in accordance with the specific powers relating to sale in the memorandum. Even if the company had power to amalgamate and to sell assets, the directors cannot, in the course of that transaction, enter into any arrangement as incidental to it which is inconsistent with their fiduciary position as directors of the company.

(1) (1868) 4 Ch. App. 117.
(2) (1898) 2 Ch. 469, at p. 482.
(3) (1904) 2 Ch. 268.

It was inconsistent with their duty for them to make the arrangement shown in the agreement in respect of the uncalled capital of the company (*Watson's Bay and South Shore Ferry Co.* v. *Whitfeld* (1)). The arrangement was *ultra vires* the directors, and was a breach of their fiduciary position.

[RICH J. referred to *Oceanic Steam Navigation Co.* v. *Sutherberry* (2).]

The discretionary power vested in directors of making calls from time to time cannot be sold by them in advance (*In re Cameron's Coalbrook Steam Coal and Swansea and Lougher Railway Co.*; *Bennett's Case* (3)). The power of entering into an amalgamation, and its exercise, must be governed by all the provisions relating to amalgamation, which include the special resolution of 26th April 1926. That resolution was not an extension of the powers of the directors, but was a restriction of those powers. The sale of the option to make calls was a departure from the proviso. As the appellant company is a going concern, an order for specific performance is not the appropriate remedy. In the circumstances the only remedy is by action for damages based upon breach, and then, if necessary, by putting the appellant company into liquidation. Clause 15 of the agreement is severable. A call can be made only in the discretion of the directors themselves. Even if the power to sell uncalled capital is good, the directors have no power to deprive themselves of their discretion to make calls (*Madeley* v. *Ross, Sleeman & Co.* (4)). Clause 6 of the agreement, which refers to future profits divisible amongst the shareholders, is inconsistent with the specific provision made in the articles, and is not severable from the remainder of the agreement. Clause 14 is capable of the construction that it includes the liability on the Queensland policies. Clause 19 is *ultra vires*. Sec. 30 of the *Life Assurance Companies Act* of 1901, of Queensland, prohibits amalgamation between a company issuing life assurance policies in Queensland, and any other company anywhere, whether the latter company issues life assurance policies or not; otherwise the protection given by the section would disappear. Clause 29 provides that the agreement

(1) (1919) 27 C.L.R. 268, at p. 277.
(2) (1880) 16 Ch. D. 236.
(3) (1854) 5 DeG. M. & G. 284; 43 E.R. 879.
(4) (1897) 1 Ch. 505.

H. C. OF A. 1934.

CITIZENS AND GRAZIERS' LIFE ASSURANCE CO. LTD. v. COMMONWEALTH LIFE (AMALGAMATED) ASSURANCES LTD.

is provisional only, and is subject to the sanction of the Court in any State in which that sanction is necessary or advisable; therefore, if sec. 30 applies, there is no agreement. If the agreement cannot be performed in Queensland because of illegality, then specific performance will not be ordered by the Courts of New South Wales.

[DIXON J. referred to *Ralli Brothers* v. *Compania Naviera Sota Y Aznar* 1).]

If the transaction was not an amalgamation, it was a transfer of the life assurance business of one company to another company, which also comes within the operation of sec. 30.

Weston K.C. (with him *Williams*), for the respondent The Commonwealth Life (Amalgamated) Assurances Ltd. In considering whether clause 15 of the agreement is *intra vires*, the agreement must be considered as a whole, and also regard must be had to the circumstances of the case. What is excepted from the sale under the agreement is assets of such a character as have a local situation in the State of Queensland. Uncalled capital in Queensland is not excepted from the sale. Subject to this exception, the appellant sold and this respondent purchased and took over the "assets, business and undertaking" of the appellant, which is adequate to pass the uncalled capital (*Ansted* v. *Land Co. of Australasia* (2); *Page* v. *International Agency and Industrial Trust Ltd.* (3)). As a matter of the construction of the agreement, the question may arise: What is to happen if, at the time this respondent makes a call, capital is needed by the appellant for its Queensland business? The solution may be that a request by this respondent to the appellant to make a call fixes this respondent's right. If the appellant has not made a call, then the proceeds of the call made at this respondent's request should go to this respondent. The transaction is a sale within the meaning of the relevant clause of the memorandum—a legitimate agreement as to uncalled capital which is an incident of that sale (*New Zealand Gold Extraction Co. (Newbery-Vautin Process)* v. *Peacock* (4)). The power to sell real and personal property is wide enough to include uncalled capital. The transaction is

(1) (1920) 2 K.B. 287.
(2) (1893) 14 N.S.W.L.R. (Eq.) 330.
(3) (1893) 68 L.T. 435.
(4) (1894) 1 Q.B. 622.

permissible as incident to the sale of the real and personal property of the company, and also as an amalgamation as incident to the power to amalgamate with another company. The power to deal with uncalled capital need not be expressly conferred in the memorandum. If the memorandum is silent as to the granting of the power, and does not prohibit dealing with uncalled capital, it is sufficient if the power is granted by the articles or by special resolution (*Newton* v. *Debenture Holders and Liquidators of the Anglo-Australian Investment, Finance and Land Co.* (1); *Jackson* v. *Rainford Coal Co.* (2); *In re Phœnix Bessemer Steel Co.* (3)).

[STARKE J. referred to *Palmer's Company Precedents*, 13th ed. (1927), Part I., pp. 461, 667.]

If the memorandum and articles are completely silent as to the power, it becomes a question of law whether the doing of a thing is incidental to any of the powers conferred in the memorandum (*Small* v. *Smith* (4)). Clause 15 of the agreement could be construed as a contract to take shares with security over the uncalled capital for money payable in respect of those shares, and as such would be within the powers in the memorandum. The transaction also comes within the power conferred by the special resolution. This respondent was formed for the purpose of buying the assets of the amalgamating companies. It has bought all the assets which it could by law buy of the appellant company, and the whole of the assets of the other company. The absolute control of this respondent is vested in the amalgamating companies (*Palmer's Company Precedents*, 13th ed. (1927), Part II., p. 1088). The word " amalgamation " is not a term of art, and its meaning must be determined. The nexus between the shareholders of the old company and the new company need not take the form of actual shareholding in the new company. Amalgamation includes partial amalgamation. It is a question of degree (*In re South African Supply and Cold Storage Co.* (5); *Palmer's Company Precedents*, 13th ed. (1927), Part II., p. 1092). The agreement is *intra vires* even though the directors of the appellant company were not empowered in terms to sell uncalled capital (*In re Bank of South Australia* (2) (6)). The correctness of the decision in *Clinch* v. *Financial Corporation* (7) is doubted (*Palmer's Company Precedents*,

(1) (1895) A.C., at p. 247.
(2) (1896) 2 Ch., at pp. 342, 343.
(3) (1875) 44 L.J. Ch. 683, at p. 685.
(4) (1884) 10 App. Cas. 119, at p. 129.
(5) (1904) 2 Ch., at p. 287.
(6) (1895) 1 Ch. 578.
(7) (1868) 4 Ch. App. 117.

H. C. OF A. 1934.

CITIZENS AND GRAZIERS' LIFE ASSURANCE CO. LTD. v. COMMONWEALTH LIFE (AMALGAMATED) ASSURANCES LTD.

13th ed. (1927), Part II., p. 1048). The special resolution is an additional power to have an amalgamation in all other respects, notwithstanding there may not be a taking up of shares in the new company by shareholders in the old company (*Buckley* on *The Companies Acts*, 11th ed. (1930), p. 179). The transaction was an amalgamation of the businesses. The businesses were amalgamated in a material sense, and also the companies, in that the shareholders in the old company became shareholders in the new company. The power to amalgamate is not limited by the power to sell (*Wall* v. *London and Northern Assets Corporation* (1)). Once it is established that the appellant company had power to enter into this transaction, it follows that the directors also had that power. By the articles the whole of the powers are vested in the directors. Art. 19 is merely a grant of authority, whereas art. 121 is a grant of power by the company to its directors ; the former article does not operate to cut down the latter article. Directors are not in the position of trustees for all purposes. The agreement was executed on behalf of the appellant company by properly appointed and duly authorized persons, the directors, and bears the common seal of the company ; therefore it is the act, not merely of the directors, but of the company (*British Thomson-Houston Co.* v. *Federated European Bank Ltd.* (2)). On the facts neither of the amalgamating companies is a " company " as defined in sec. 4 of the *Life Assurance Companies Act* 1901 of Queensland. The provisions of that Act were not intended to, and do not, extend to a company wherever situate. That Act cannot operate to prevent foreign companies from transferring their businesses to one another outside Queensland merely because they do some of their business within Queensland. It is not competent to forbid dealings between companies taking place abroad as to their assets abroad. The Queensland Legislature sought to fetter transfers of a life assurance business either by way of transfer or under amalgamation in Queensland. In any event there was no transfer of the life assurance business in Queensland, and no amalgamation resulting in such a transfer. Assuming that sec. 30 of the *Life Assurance Companies Act* applies to the companies concerned and to this transaction, the agreement is valid everywhere except

(1) (1898) 2 Ch., at pp. 478, 479, 482.

(2) (1932) 2 K.B. 176.

in Queensland. The circumstances surrounding the agreement and the conduct of the parties are sufficient to find an implied agreement until such time as the law of Queensland permits the carrying out of the option given over the Queensland business. As to the making of calls, the agreement confers upon this respondent the right only to call upon the appellant to make calls upon its shareholders. The appellant promised to pay specific moneys to this respondent for a specific purpose; therefore those moneys are trust moneys. Sec. 8 of the *Equity Act* 1901 (N.S.W.) applies. The agreement is capable of being specifically performed, and an order to that effect by the Court can be enforced. For this purpose there is no difference between calls made by directors and calls made in a winding up (*In re Pyle Works* (1)).

G. W. Mitchell, for the respondent The Commonwealth Life Assurance Society Ltd., submitted to such order as the Court deemed fit to make.

Sir *Thomas Bavin* K.C., in reply. Clause 15 in effect gives the purchasing company an option over the uncalled capital. There cannot be an amalgamation of companies unless there is a blending of the corporators in those companies. The shareholders themselves must be parties to the arrangement, or have the right to become members of the new entity. The shareholders of the appellant company have not assented to the agreement.

[DIXON J. referred to *In re Bank of Hindustan, China and Japan Ltd.*; *Higg's Case* (2).]

Although it is otherwise as regards a business, the amalgamation of a company cannot be effected by transferring its assets; that is merely a sale of assets.

[STARKE J. referred to *Cocker's Case* (3), *Rivington's Case* (4), and *Doman's Case* (5).]

Companies cannot at one and the same time be amalgamated and have a separate existence. The rule that a company may do anything

(1) (1890) 44 Ch. D., at pp. 547, 574.
(2) (1865) 2 H. & M. 657; 71 E.R. 619.
(3) (1876) 3 Ch. D. 1, at p. 9.
(4) (1876) 3 Ch. D. 10, at p. 17.
(5) (1876) 3 Ch. D. 21, at p. 24.

H. C. OF A. 1934.

CITIZENS AND GRAZIERS' LIFE ASSURANCE CO. LTD. v. COMMONWEALTH LIFE (AMALGAMATED) ASSURANCES LTD.

reasonably incidental to the carrying out of its objects does not extend to all its powers. General powers conferred by the articles are restricted by the particular powers so conferred. A power to sell uncalled capital must be express, not implied. *Newton* v. *Debenture Holders and Liquidators of the Anglo-Australian Investment, Finance and Land Co.* (1) and *In re Bank of South Australia* (2) are "liquidation" cases, and, therefore, are not applicable. Here the directors of the appellant company had knowledge of their deficiency of power; therefore *British Thomson-Houston Co.* v. *Federated European Bank Ltd.* (3) is distinguishable. (See also *Howard* v. *Patent Ivory Manufacturing Co.*; *In re Patent Ivory Manufacturing Co.* (4)).

Weston K.C., by leave. Notice to one director of a company is not notice to the company (*In re Marseilles Extension Railway Co.*; *Ex parte Crédit Foncier and Mobilier of England* (5); *In re Hampshire Land Co.* (6); *J. C. Houghton & Co.* v. *Nothard, Lowe & Wills Ltd.* (7); *Buckley* on *The Companies Acts*, 11th ed. (1930), p. 736.)

Cur. adv. vult.

Aug. 2.

The following written judgments were delivered :—

GAVAN DUFFY C.J. I agree with the judgment of *Starke* J., and think that the appeal should be dismissed.

RICH J. I have read the judgment prepared by *Dixon* J. and agree with it.

In my opinion the appeal should be allowed with costs, and the suit dismissed with costs.

STARKE J. This was a suit on the part of the Commonwealth Life (Amalgamated) Assurances Ltd. (called the Amalgamated Co.) and the Commonwealth Life Assurance Society Ltd. (called the C.L.A. Society) and the Citizens and Graziers' Life Assurance Co.

(1) (1895) A.C. 244.
(2) (1895) 1 Ch. 578.
(3) (1932) 2 K.B. 176.
(4) (1888) 38 Ch. D., at p. 170.
(5) (1871) 7 Ch. App. 161.
(6) (1896) 2 Ch. 743.
(7) (1928) A.C. 1.

Ltd. (called the C. and G. Co.), praying that an agreement of 14th December 1926 between the three companies be specifically enforced, that the C. and G. Co. be ordered to pay over to the Amalgamated Co. certain moneys which it had received in respect of calls on its shares, and also to make another call of 1s. per share on its shareholders. The C.L.A. Society was incorporated in 1920 in New South Wales, and was carrying on the business of life assurance in Australia, except in the State of Queensland. The C. and G. Co. was incorporated in New South Wales in 1921, and was also carrying on the business of life assurance throughout Australia. The Amalgamated Co. was incorporated in New South Wales in 1926, and its objects included the acquisition of businesses, and the carrying on of life assurance business. In 1926 the C.L.A. Society and the C. and G. Co. agreed to transfer and dispose of their assets and undertakings to the Amalgamated Co. This is the agreement of 14th December 1926, in respect of which specific performance is prayed. It recites that the C.L.A. Society and the C. and G. Co. have agreed (subject to the exception thereinafter contained) to sell and transfer and dispose of their assets and businesses respectively as thereinafter appearing, and their undertakings as going concerns to the Amalgamated Co. upon the terms and conditions thereinafter appearing. By the agreement, the C.L.A. Society and the C. and G. Co. sell, and the Amalgamated Co. purchases and takes over the assets, business and undertakings (including goodwill) of the C.L.A. Society and the C. and G. Co. respectively, both present and future, as going concerns as from 13th September 1926, and the Amalgamated Co. assumed the liabilities of the C.L.A. Society and the C. and G. Co., and indemnified them from all claims and demands whatever on policies of life endowment, industrial, accident, or other policies of assurance issued by the C.L.A. Society or the C. and G. Co. There was excepted from the sale and purchase and taking over so much of the assets, business and undertaking (including goodwill) in the State of Queensland of the C. and G. Co. as then or thereafter formed part of or related to its life assurance fund and operation in that State, or that was otherwise subject to the Acts of Parliament of that State dealing with life assurance, and it was agreed that the life assurance business in that State of the C. and G. Co. should at

H. C. OF A. 1934.

CITIZENS AND GRAZIERS' LIFE ASSURANCE CO. LTD. v. COMMONWEALTH LIFE (AMALGAMATED) ASSURANCES LTD.

Starke J.

all times continue to be carried on by it under its sole control as theretofore, and as if the agreement had not been made, and that the Amalgamated Co. should not, so long as the then *Life Assurance Acts* of Queensland remained in operation, commence to transact life assurance business in Queensland, or carry on such business within that State. Provision was made for the price to be paid, but the C.L.A. Society and the C. and G. Co. undertook and agreed to invest the whole of the moneys received as purchase money in the Amalgamated Co. in contributing shares which should be paid to the full amount of £1 each. In addition, the Amalgamated Co. agreed to purchase the right to the future profits of the C. and G. Co., arising from its life assurance business in Queensland and divisible amongst its shareholders, for a price to be fixed by named persons, and payable in an equivalent number of shares in the Amalgamated Co. of £1 each fully paid up issued to nominees of the C. and G. Co. It was declared that the shares should be held upon trust to pay all dividends received to the C. and G. Co. so long as it carried on life assurance business in Queensland, and in the event of its ceasing so to do, upon trust to sell and to hold the proceeds for the Amalgamated Co. The C.L.A. Society and the C. and G. Co. agreed to transfer and assign all the assets and business so sold which the Amalgamated Co. required, in its name, other than uncalled capital. The agreement also stipulated that the C.L.A. Society and the C. and G. Co. might make such calls as were considered necessary to provide certain costs, and to pay off any liability not taken over by the Amalgamated Co. The Amalgamated Co., it was also stipulated, was to be at liberty from time to time as considered necessary to call on the C.L.A. Society and the C. and G. Co. to make such call or calls on their uncalled capital as might be determined, and that the net sum realized should be transferred to the Amalgamated Co., and fully paid shares issued by it in respect of all moneys so received. The agreement is declared to be provisional only, and is subject to the sanction of the Court in any State in which sanction is necessary or advisable. The form of the agreement was no doubt dictated by *The Insurance Act* of 1923 of Queensland. It provided (sec. 2 (2)): " From and after the date of the passing of ' *The Insurance Act of* 1923 ' no company

shall commence to transact life assurance business within Queensland or carry on such business within Queensland unless such company is a company in which the net profits from time to time earned by the company are by the constitution of the company exclusively divisible amongst the policy holders of the company." The agreement was, in fact, sanctioned in all the States in which sanction is necessary or desirable, other than in the State of Queensland.

In my opinion, the words of the agreement operate as an assignment of the uncalled capital of both the C.L.A. Society and the C. and G. Co. True, both these companies are given a sort of floating power over it for the purpose of meeting certain liabilities, but the Amalgamated Co. may insist upon its being called up for its benefit whenever it chooses so to do. But the C. and G. Co. contends that the agreement, so far as it operates as an assignment of uncalled capital, is beyond its capacity and power, and in any case is illegal or unenforceable, because the sanction required by the law of Queensland has not been given to the agreement.

The objects for which the C. and G. Co. was established are very wide. They include powers to lease, sell, dispose of or otherwise deal with, all or any property of the company, to sell any real or personal estate or property and the undertaking of the company for such consideration as the company may think fit, to take or otherwise to hold shares in any other company having objects altogether or in part similar to those of the company, and to borrow, raise or secure payment of money in such manner as the company shall think fit, and to do all such other things as are incidental or conducive to the attainment of the objects of the company or any of them. But the cases of *In re Streatham and General Estates Co.* (1), *In re Pyle Works* (2), and *In re Russian Spratts Patent Ltd.*; *Johnson* v. *Russian Spratts Patent Ltd.* (3), are decisive, as it seems to me, that the sale or assignment of uncalled capital is not justified or warranted by any of these powers. There is, however, another power: to amalgamate with any other company having objects altogether or in part similar to those of this company. Amalgamation has no definite legal meaning: it is

(1) (1897) 1 Ch. 15. (2) (1890) 44 Ch. D. 534.
(3) 1898) 2 Ch. 149.

H. C. OF A. 1934.

CITIZENS AND GRAZIERS' LIFE ASSURANCE CO. LTD. v. COMMONWEALTH LIFE (AMALGAMATED) ASSURANCES LTD.

Starke J.

a commercial and not a legal term, " and even as a commercial term bears no definite meaning " (*In re South African Supply and Cold Storage Co.* (1); *Lindley* on *Companies*, 6th ed. (1902), vol. II., p. 1200; *Palmer's Company Precedents*, 11th ed. (1912), p. 1481). " It is perhaps generally understood to express or imply a transfer by one or more companies of their assets and liabilities either to a new company formed to take them, or to an already existing company in consideration of shares in such company which are given, or at least offered to the members of the transferring companies " (*Lindley* on *Companies*, 6th ed. (1902), vol. II., p. 1200). The strictest sense of the term implies that every shareholder in the transferring companies becomes a shareholder in the company taking over the assets and liabilities. (See *Cocker's Case* (2).) But that is not essential: " A power to amalgamate would probably be held to authorize a purchase of the assets and liabilities of another company " (*Lindley* on *Companies*, 6th ed. (1902), vol. II., p. 1200). And in *Rivington's Case* (3) and *Doman's Case* (4), *Cairns* L.C., *James* L.J., and *Baggallay* J.A. were inclined to the view that an amalgamation took place on the transfer of the assets and business liabilities from one company to another, on terms that the proprietors or shareholders in the transferring company making over their shares to trustees of the other company should receive a sum in cash, or at their election shares in the other company wholly or in part paid up. Again, it is not essential to an amalgamation that the whole of the undertaking or business of a company should pass or be transferred to another company (*Wall* v. *London and Northern Assets Corporation* (5); *In re South African Supply and Cold Storage Co.* (6)). No doubt, as *Buckley* J. said in the *South African Co.'s Case* (7), " an amalgamation may take place . . . either by the transfer of undertakings A. and B. to a new corporation, C., or by the continuance of A. and B. by B., upon terms that the shareholders of A. shall become shareholders in B. It is not necessary that you should have a new company. You may have a continuance of one of the two companies upon the terms that the undertakings

(1) (1904) 2 Ch., at pp. 281, 282.
(2) (1876) 3 Ch. D., at p. 9.
(3) (1876) 3 Ch. D. 10.
(4) (1876) 3 Ch. D. 21.
(5) (1898) 2 Ch. 469.
(6) (1904) 2 Ch., at p. 287.
(7) (1904) 2 Ch., at p. 287.

of both corporations shall substantially be merged in one corporation only." *Palmer's Company Precedents*, 11th ed. (1912), p. 1481, is to the same effect. Further, an amalgamation may take place though the term " amalgamation " be not used. It is the substance of the transaction and not the mere form that governs its character. (See *Palmer's Company Precedents*, 11th ed. (1912), p. 1489, and note Form 793, at pp. 1488 *et seq.*)

Now in the present case we have two companies setting over their undertakings, business and assets to a new company. It is true that the life assurance business of the C. and G. Co. in Queensland is excepted, but other stipulations set over, for a consideration, even the profits of the business so excepted to a new company. It is true also that the C.L.A. Society and the C. and G. Co. may use their uncalled capital for certain purposes until it is called up by the new company. In my opinion, neither of these exceptional provisions destroys the real substance of the transaction, namely, the taking over by the new company of the undertakings and business of the transferring companies. The scheme, however, does not provide that the shareholders in the transferring companies shall become shareholders in the new company, nor does it contain any provision conferring any rights upon members of the transferring companies to become members in the new company. In substance, however, the transfer is for shares in the new company. The price for the property transferred is fixed by auditors, and the whole of the moneys received as purchase money shall, it is agreed, be invested in shares of the new company in the names of the transferring companies, or in the names of not less than two, nor more than seven, nominees of each of them. The individual corporators in the old company are not corporators in the new company. But is that essential to amalgamation ? I do not think it is. It is uniting in whole or in part the undertakings and business of two or more companies in a new company or in one of the old companies, so that those undertakings and businesses may in future be carried on as one business, that is the essence of amalgamation. The fact that the corporators are the same is evidence of the character of the transaction, but the shareholding of the transferring companies is quite as strong in that direction as is the fact that the individual

H. C. OF A. 1934.

CITIZENS AND GRAZIERS' LIFE ASSURANCE CO. LTD. v. COMMONWEALTH LIFE (AMALGAMATED) ASSURANCES LTD.

Starke J.

corporators in the transferring companies are corporators in the new company; it shows that the persons beneficially interested in the business now carried on by the new company are in substance the same as those who were interested in the business carried on by the old companies. *Rivington's Case* (1) and *Doman's Case* (2) support, I think, this conclusion. *James* L.J. said in *Doman's Case*:—"I do not think we ought to be astute to find grounds for upsetting amalgamations; because, if the thing is really done honestly, the amalgamation of two weak companies is far from being a prejudice to the person who claims. It is like putting together two weak hives to make a strong one, and the company consisting of two weak companies might be a very strong company, and capable of carrying on its business at a profit when the two separately might come to an end. I do not think we ought to seek reasons that it was *ultra vires* or that it was a fraud" (3). This is particularly true of the transferring companies in this case; alone, it may be doubted whether they could have continued in business, united they may succeed. The name given to the new company, The Commonwealth Life (Amalgamated) Assurances Ltd., indicates, to some extent, what those who united the business of the two companies would call the transaction from a business standpoint. And so does the evidence given by George Frederick Stack and E. H. Higgs. After all, "amalgamation" is a business term, which has no definite meaning. Latitude in arrangement is therefore necessary, and not undesirable. In my opinion, the agreement of 14th December 1926 is within the power of the C. and G. Co. to amalgamate with any other company having objects altogether or in part similar to those of the C. and G. Co.

But it is contended that the agreement is contrary to the policy of the Queensland *Life Assurance Companies Act* of 1901, sec. 30 (5): "No company shall amalgamate with another company, or transfer its business to another company, unless such amalgamation or transfer is sanctioned by the Court in accordance with this section." The interpretation section (sec. 4) provides that "unless the context otherwise indicates the following terms have the meanings set against

(1) (1876) 3 Ch. D. 10. (2) (1876) 3 Ch. D. 21.
(3) (1876) 3 Ch. D., at p. 27.

them respectively, that is to say"; among these terms is "Company," whose meaning is given as "any person, or persons, corporate or unincorporate, not being registered under the laws in force for the time being relating to friendly societies, who issues or issue or is or are liable under policies of assurance upon human life within Queensland." There is nothing in the context of the Act that indicates that the word "company" in sec. 30 (5) should be interpreted otherwise than in accordance with the meaning prescribed by sec. 4. The context of sec. 30 itself limits its application to life assurance companies. A further limitation is necessary if the section is not to transcend the territorial jurisdiction of the Queensland Legislature, and that limitation is prescribed by, or is found in, sec. 4. But the term being so limited, this case falls outside the prohibition of sec. 30 (5). The C.L.A. Society, it is admitted, never issued, nor was it liable under, policies of assurance upon human life within Queensland. The Amalgamated Co. does not issue and is not liable under policies of assurance upon human life within Queensland. Indeed, *The Insurance Act* of 1923, sec. 2 (2), already referred to, prohibits it transacting life assurance business within Queensland. Consequently, the C. and G. Co. has not amalgamated with another company, or transferred its business to another company that "issues or issue or is or are liable under policies of assurance upon human life within Queensland." Subject to the consideration of one further argument, it seems to me, as it did to *Harvey* A.C.J. of the Supreme Court of New South Wales, that when the Amalgamated Co. called upon the C. and G. Co. under the agreement of the 14th December to make a call upon its uncalled capital, then the C. and G. Co. was bound, pursuant to the terms of that agreement, to make the call and account to the Amalgamated Co. for net proceeds realized.

It was argued, however, that such a call would be inconsistent with the fiduciary duty which the directors of the C. and G. Co. owed to their shareholders. But there is nothing inconsistent with their fiduciary duty to their members in carrying out and performing the stipulations of a valid agreement into which they entered for the benefit and advantage of the company.

In my opinion, the appeal should be dismissed.

H. C. OF A. 1934.

CITIZENS AND GRAZIERS' LIFE ASSURANCE CO. LTD. v. COMMONWEALTH LIFE (AMALGAMATED) ASSURANCES LTD.

DIXON J. The Citizens and Graziers' Life Assurance Co. Ltd., which was incorporated in 1921 under the law of New South Wales, carried on, apparently on no very large scale, the business of life assurance in various States, including Queensland. The Commonwealth Life Assurance Society Ltd., also incorporated in New South Wales, carried on another such business in various States, not including Queensland.

In 1926, the companies arranged a union of their businesses. Meanwhile the Queensland statute governing life assurance companies (*The Life Assurance Companies Act* of 1901), which contained many of the provisions of the English Acts of 1870, 1871 and 1872, had been amended by *The Insurance Act* of 1923. The amendments included a provision (sec. 2 (2)) forbidding any company, not carrying on life assurance business within Queensland at the date of the passing of the Act, to commence to transact life business or carry on such business in Queensland, unless, by the constitution of the company, its net profits are exclusively divisible among its policy holders. Neither of the businesses which were to be combined was conducted on mutual principles, and the Queensland enactment, therefore, stood in the way of any form of union which included a transfer of the business of the Citizens and Graziers' Co. to the Commonwealth Society, or to a new company. The third course of transferring the business of the Commonwealth Society to the Citizens and Graziers' Co., and making such changes in the latter's name and constitution as might be required, did not commend itself to the parties. A plan was adopted, which, while avoiding any transfer of the Queensland life business, enabled each of the promoting companies to remain in existence and retain its separate identity. A new company was formed and registered in New South Wales. It was named " The Commonwealth Life (Amalgamated) Assurances Limited." Ample power was taken in its memorandum of association for acquiring the whole or part of the insurance business of any other company, and upon any terms and conditions. Although neither the memorandum nor the articles of the new company contained any express reference to the proposed transaction, the articles dealing with directors were apparently directed to it. Persons who were in fact nominees of the promoting companies

were named by the articles as the first directors, and a provision was made entitling a company whose business might be acquired by the company to nominate to its board a director or directors according to the terms of acquisition. When the new company had been registered, an agreement between it and the two promoting companies was prepared, the leading principles of which are (1) that the Commonwealth Society should transfer to the new company its business for a price to be fixed by valuation, and to be applied in taking up shares in the new company; (2) that the Citizens and Graziers' Co. should transfer to the new company its business, except its life business in Queensland, at a price to be fixed by valuation, and to be applied in taking up shares in the new company; (3) that the Queensland life business of the Citizens and Graziers' Co. should continue under the conduct and control of that company, but that, for a further consideration, the new company should receive the net profits arising therefrom; (4) that the new company's four directors should be nominated, two by the Citizens and Graziers' Co. and two by the Commonwealth Society, and of these latter, for three years, one should be chairman with a casting vote; (5) that the shares in the new company taken up by the promoting companies in satisfaction of the sums respectively payable to them by way of price should be registered either in their respective names, or in those of nominees not exceeding seven in number, who should not transfer them without the consent of all the directors nominated by the two promoting companies; (6) that the new company should be entitled, if it should require it, to the benefit of the uncalled capital of the promoting companies, issuing to each of them its own share capital for the amount paid over.

This agreement was duly executed under the seals of the three companies. The substance of the provisions contained in sec. 14 of the British *Life Assurance Companies Act* 1870 is in force in Western Australia, South Australia, Victoria and Queensland, but not in New South Wales. (See sec. 37 of the *Life Assurance Companies Act* 1889 of Western Australia; sec. 40 of the *Life Assurance Companies Act* 1882 of South Australia; sec. 461 of the *Companies Act* 1928 of Victoria; and sec. 30 of the *Life Assurance Companies*

H. C. OF A. 1934.

CITIZENS AND GRAZIERS' LIFE ASSURANCE CO. LTD. v. COMMONWEALTH LIFE (AMALGAMATED) ASSURANCES LTD.

Dixon J.

Act of 1901 of Queensland.) These provisions forbid the amalgamation of two or more life assurance companies, or the transfer of the life assurance business of one company to another, unless the sanction of the Court is obtained. Applications for sanction were made to the Supreme Courts of the three first-named States, which confirmed the transaction as an amalgamation of the Citizens and Graziers' Co. and the Commonwealth Society save as to the life assurance business in the State of Queensland of the former company. No application for sanction by the Supreme Court of Queensland appears to have been considered necessary. At any rate, none was made. Except in that State, the new company took over the assets of the two promoting companies and the conduct of the businesses carried on by them.

In November 1930, the board of the new company determined that they would resort to the uncalled capital of the promoting companies. They proceeded under the agreement to require each of the two companies to call up 1s. upon its share capital issued not fully paid up. Both companies complied with the requirement, but the Citizens and Graziers' Co. refused to pay over the proceeds of its call. In July 1932, in order to make partial provision for an actuarial deficit of a considerable amount appearing from a valuation of its policy liabilities, the new company called upon the promoting companies each to make a further call of 1s. a share upon its uncalled capital. This time the Citizens and Graziers' Co. refused to make the call. Thereupon the new company instituted a suit for specific performance of the agreement. The Citizens and Graziers' Co. defended the suit upon grounds of illegality and *ultra vires*. *Harvey* C.J. in Eq., who heard the suit, overruled the defences and made a decree declaring that the Citizens and Graziers' Co. is bound to pay to the plaintiff, the new company, in return for fully paid shares of an equivalent face value, an amount equal to the net amount realized for the call made, and to make a further call of 1s., upon its contributing shares, and to pay over the net proceeds, and ordering payment of the net amount of the first call already received or afterwards received.

From that decree the Citizens and Graziers' Co. now appeals.

In support of the appeal reliance is placed upon the absence of sanction by the Supreme Court of Queensland. It is said that it is unlawful without that sanction to carry out the agreement in the State of Queensland, and that an agreement, fulfilment of which is illegal under the law of one of the places of performance, will not be specifically enforced, wholly or in part, even in the forum of the place where the contract was lawfully entered into. The first difficulty encountered by this contention lies in the Queensland statute itself. Sec. 4 of *The Life Assurance Companies Act* of 1901 provides what in the Act, unless the context otherwise indicates, shall be the meaning of the word " company." So far as material it is " any person, or persons, corporate or unincorporate, . . . who issues or issue or is or are liable under policies of assurance upon human life within Queensland." The Commonwealth Society, it is conceded, did not issue and was not liable under policies of assurance upon human life within Queensland. Sec. 30 contains the following sub-sections :—(1) When it is intended to amalgamate two or more companies, or to transfer the life assurance business of one company to another company, the directors of any one or more of such companies may apply to the Court by petition to sanction the proposed arrangement. (5) No company shall amalgamate with another company, or transfer its business to another company, unless such amalgamation or transfer is sanctioned by the Court in accordance with this section. (6) This section shall not apply to any case in which the business of any company which is sought to be amalgamated or transferred does not comprise the business of life assurance.

If the definition of " company " applies with no qualification to sub-secs. (1) and (5), it is apparent that the transaction does not fall under the restraint which the provision imposes. For one of the two companies, the transferee, is not a company within the definition. Both the definition of " company " and the provisions of the sub-sections are adapted from the English statute of 1870. Two reasons are, or may be, relied upon for treating the definition of " company " as not entirely applicable. The first is that it would be inconsistent with the evident policy of the legislation to confine

H. C. OF A. 1934.

CITIZENS AND GRAZIERS' LIFE ASSURANCE CO. LTD. v. COMMONWEALTH LIFE (AMALGAMATED) ASSURANCES LTD.

DIXON J.

the operation of the section to transactions between companies both of which issue or are liable under policies of assurance upon human life in the State. This ground will not, in my opinion, support the burden placed upon it. The general policy of the provision is sufficiently plain. But, at the point of dispute, namely, what territorial limit the Legislature intended to adopt in its actual application, there is little guidance to be found in the nature of the policy. What is clear is that, in framing sec. 30 (1) and (5), the draftsman relied upon the definition; for the sub-sections use the simple word "company" to describe the persons and bodies whose conduct is regulated. Without the definition, there would be no reference to an individual and no reference to life assurance. Again the words of sub-sec. 1 are "two or more companies" and the territorial restriction contained in the definition of "company" must be treated as applying either to all or to none of the "two or more" to which the word extends. Then the English Act of 1870, upon sec. 14 of which sec. 30 of the Queensland Act is based, enacts, without providing for qualification by context, that in that Act "company" means any person or persons corporate or unincorporate . . . who issue or are liable under policies of assurance upon human life within the United Kingdom." The Queensland definition, which is simply adapted from the English, should have the same effect. It is, perhaps, worth adding that an analogous contention in relation to the application of the definition of "company" in sec. 285 of the English *Companies (Consolidation) Act* 1908 to sec. 192 was rejected by *Eve* J. in *Thomas* v. *United Butter Companies of France Ltd.* (1). The second of the reasons suggested for rejecting the definition of "company" lies in sub-sec. 6 of sec. 30 which, at first sight perhaps, seems unnecessary if the definition applies and restricts "company" to life assurance company. But the object of sub-sec. 6 is to exclude from the operation of sec. 30 transfers or amalgamations of departments of insurance other than life, although conducted by life companies.

For these reasons I think the transaction now in question did not require the sanction of the Supreme Court of Queensland.

(1) (1909) 2 Ch. 484, see pp. 489-491.

It thus becomes necessary to consider the defence of *ultra vires*. In effect, this defence is put upon the ground that so much of the agreement as purports to confer upon the plaintiff (the new company) rights in respect of the uncalled capital of the Citizens and Graziers' Co. is beyond the powers of the latter company or of its directors. Among the objects contained in the memorandum of association of the Citizens and Graziers' Co. is the familiar clause, taken from *Palmer's Company Precedents*, 13th ed. (1927), vol. I., p. 499, " to amalgamate with any other company having objects altogether or in part similar to those of this company ". This object, either by itself or in combination with the wide incidental powers expressly taken in the memorandum, is relied upon as a complete authority for the entire transaction. Much has been said of the vague and indefinite meaning of the word " amalgamate " as a description of a transaction between companies. Lord *Hatherley*, Lord *Lindley*, Lord *Davey*, and Lord *Wrenbury* have confessed their inability to define it (*In re Bank of Hindustan, China and Japan Ltd.*; *Higg's Case* (1); *In re Empire Assurance Corporation*; *Ex parte Bagshaw* (2); *Wall* v. *London and Northern Assets Corporation* (3); *New Zealand Gold Extraction Co.* (*Newbery-Vautin Process*) v. *Peacock* (4); *In re the Joint Application of the Great Northern Railway Co. and the Great Central Railway Co.* (5)). The expression is figurative and is a commercial rather than a legal description. The general notion conveyed by " amalgamation " is the combination of separate things or separate collections of things into a single uniform or homogeneous whole. In spite of the commercial origin of the use of the terms " amalgamation," " reconstruction," and " reorganization " as descriptions of company transactions, their meaning is not to be ascertained by considering the lay understanding of the expressions, but rather by referring to text writers upon company law, who are specially conversant with the subject (per *Chitty* J., *Hooper* v. *Western Counties and South Wales Telephone Co.* (6)). " An ordinarily prudent member of the public

(1) (1865) 2 H. & N. 657, at p. 666; 71 E.R. 619, at p. 622.
(2) (1867) L.R. 4 Eq. 341, at p. 347.
(3) (1898) 2 Ch., at p. 478.
(4) (1894) 1 Q.B., at p. 632.
(5) (1904) 24 T.L.R. 417, at p. 425.
(6) (1892) 68 L.T. 78, at p. 80; 9 T.L.R 17, at p. 18.

H. C. OF A. 1934.

CITIZENS AND GRAZIERS' LIFE ASSURANCE CO. LTD. v. COMMONWEALTH LIFE (AMALGAMATED) ASSURANCES LTD.

Dixon J.

unacquainted with company law, would if he were also ordinarily modest, hesitate before he put a meaning to the words" (1).

Text writers concur in treating amalgamation as a description of transactions which, however carried out, result in the substitution of one corporation for the two or more uniting companies, and the conversion, in effect, of the separate sets of members of the *uniting* companies into a single set of members of the one corporation. *Lindley* on *Companies*, 6th ed. (1902), vol. II., p. 1202, said: "Amalgamation with another company must involve a complete change in, if not a destruction of, one at least of the companies intending to amalgamate." *Palmer's Company Precedents*, 13th ed. (1927), vol. II., p. 1088, says :—" It is a popular phrase, and, as such, has for many years (see first edition of this work, published in 1877) been used to describe various transactions differing considerably in detail, but generally falling within one or other of the following heads :—(*a*) The transfer of the undertaking of an existing company or of several existing companies to another existing not newly formed company, of which all the members of the transferring company or companies become or have the right to become members, and the subsequent dissolution of the transferring company or companies. (*b*) The transfer of the undertaking of two or more existing companies to a new company formed to take over the same, of which all the members of the transferring companies become or have the right to become members, and the subsequent dissolution of the transferring companies."

In *Wall* v. *London and Northern Assets Corporation* (1), *Chitty* L.J. says :—" In strictness I do not understand how you can amalgamate two corporations having each a separate existence. It has been suggested . . . that one way (and I agree . . . so far) is to form a third company. That is not, in any strict sense, an amalgamation of two companies. The two companies sell and transfer their undertakings to a new entity—that is, a third company established for that purpose; and then the two companies which are said to be amalgamated with this new entity vanish out of existence and wind themselves up and disappear." Here, again,

(1) (1898) 2 Ch., at p. 482.

the transmutation of the former incorporated bodies into one is emphasized. The same thing is implicit in the better known description of amalgamation by *Buckley* J. :—" There you must have the rolling, somehow or other, of two concerns into one. You must weld two things together and arrive at an amalgam—a blending of two undertakings. It does not necessarily follow that the whole of the two undertakings should pass—substantially they must pass—nor need all the corporators be parties, although substantially all must be parties. The difference between reconstruction and amalgamation is that in the latter is involved the blending of two concerns one with the other, but not merely the continuance of one concern " (*In re South African Supply and Cold Storage Co.* (1)).

The union of shareholders, which amalgamation involves, is, of course, not concerned with the members of the combining corporations as persons. It is the reorganization of share capital that matters. The replacement of two separate systems of share capital by one appears to be required before a union of two companies limited by shares can justly be called an amalgamation of the companies. In the process of reorganization, classes or divisions of shares, or amount of share capital, in one or other or both of the old companies may find no representation in the one system of capital which emerges. But the substantial result must be to reduce for practical purposes two or more organizations of capital to one, and two or more incorporated companies to one. The amalgamation to which the clause in the memorandum refers is not a mere combination of businesses separately conducted, but an amalgamation of companies. There is no context to enlarge the meaning of the expression. To accomplish such an amalgamation, it seems necessary, either to consolidate the constituent elements of the old companies into a new one, or to merge in one of the old companies the constituent elements of the other. Possibly a transaction may be an amalgamation although the corporate existence of the consolidating companies, or of the merged company, may be continued for some special and definite purpose. But the continuance of two

(1) (1904) 2 Ch., at p. 287.

H. C. OF A. 1934.

CITIZENS AND GRAZIERS' LIFE ASSURANCE CO. LTD. v. COMMONWEALTH LIFE (AMALGAMATED) ASSURANCES LTD.

DIXON J.

corporations under separate control, organized with their separate systems of share capital and capable of independent activities, appears to me inconsistent with an amalgamation of more than their existing enterprises.

In the present case, there is not even a complete amalgamation of undertakings. No doubt, the desire of the promoting companies was to give the new company as much beneficial interest as they safely could in the Queensland life business of the Citizens and Graziers' Co. To this end clause 6 provided that the new company should also purchase the right to the future profits of the Citizens and Graziers' Co. arising from its life business in Queensland, and divisible amongst its shareholders, for a sum to be fixed by two named persons, respectively directors of the promoting companies, and that the sum should be payable by the issue of fully paid up shares in the new company to nominees of the Citizens and Graziers' Co. who should hold them upon trust, (*a*) while that company carried on the Queensland life business, to pay it the dividends received upon the shares and, (*b*) if that company ceased to carry on such business, or if it became unlawful to pay over the profits, to dispose of the shares under the direction of the new company, and hold the proceeds upon trust for it. The effect of clauses 14 and 19 of the agreement is to allow the Citizens and Graziers' Co. to call up any of its capital for the time being uncalled to meet liabilities incurred in the Queensland life business, and to enable the new company, if legislative changes in Queensland permit a non-mutual company to commence the transaction there of life business, to acquire the life business of the Citizens and Graziers' Co. by increasing the price fixed under clause 6 by the amount of any calls so made together with £100, all to be satisfied in shares of the new company. But the desire to make the new company the beneficial owner of the Queensland life business was overshadowed by the fear of infringing upon Queensland law. The agreement, therefore, begins with an elaborate cautionary clause, which excepts from the purchase and taking over so much of the undertaking of the Citizens and Graziers' Co. as relates to its life assurance fund and operations in Queensland, requires that its life business shall

continue to be carried on by it under its sole control as if the agreement had not been made, forbids the new company, while the present legislation remains in operation, to commence or carry on life assurance business in Queensland, and directs that the agreement shall be read and construed so as to give full force and effect to the clause, and that, where necessary for the purpose, other clauses should be deemed to be subject to it. It is true that in *Wall* v. *London and Northern Assets Corporation* (1), and *In re South African Supply and Cold Storage Co.* (2), although assets were excepted from the undertakings transferred, the transactions were held to be amalgamations. But, in the first case, the assets excepted consisted of shares in the transferee company in which the transferor was to be merged, and, in the second, of a small sum retained to cover liquidation expenses.

The Queensland life business appears to have formed an important part of the enterprise of the Citizens and Graziers' Co., and the agreement prevents a blending of that business under one control and management, but leaves it to be carried on by the promoting company on its independent responsibility and at the risk of its uncalled capital. Apart from the incompleteness of the union of businesses, the transaction not only does not involve the replacement of two corporate bodies and two systems of share capital by one, but it is inconsistent with it. The shares in the new company are issued to the promoting companies or their nominees. The nominees may not transfer them without the new company's consent. Without a liquidation, the promoting companies could not distribute them to their shareholders in exchange for their own shares. No liquidation is consistent with the agreement, both because the Citizens and Graziers' Co. must carry on the Queensland life business, and because both companies must be in a position to call up capital as required by the new company. In fact the agreement contemplates the continuance of the promoting companies as two independent concerns, making separate profits or losses, and governed by different boards of directors and constituted by different sets of shareholders. The Citizens and Graziers' Co., under its memorandum

(1) (1898) 2 Ch. 469.

(2) (1904) 2 Ch. 268.

H. C. OF A. 1934.

CITIZENS AND GRAZIERS' LIFE ASSURANCE CO. LTD. v. COMMONWEALTH LIFE (AMALGAMATED) ASSURANCES LTD.

DIXON J.

of association, might, quite consistently with the agreement, proceed to carry on independently the business of a loan company, an investing company, a financial agency company, and, perhaps, even a land and building company. In these circumstances I do not think the transaction is an amalgamation within the object of the company which enables it to amalgamate with any other company having similar objects.

Apart from the power to amalgamate, the objects of the Citizens and Graziers' Co. are sufficient to authorize the transaction in all respects, except in so far as it deals with uncalled capital. Among its objects are the following:—"To lease, sell, dispose of or otherwise deal with all or any property of the company." "To promote any other company for the purpose of acquiring all or any of the property or liabilities of this company or for advancing directly or indirectly the objects or interests thereof and to take or otherwise acquire and hold shares in any such company and to guarantee the payment of any debentures or other securities issued by any such company." "To sell any real or personal estate or property and the undertaking of the company or any part thereof for such consideration as the company may think fit and in particular for shares, debentures or securities of any other company having objects altogether or in part similar to those of this company." "To enter into, contract or carry out and do all such other acts, matters and things as may be incidental or conducive to the attainment of all or any of the above objects or all or any objects of a like or similar nature." "To enter into, carry on and execute all monetary and financial arrangements and do all matters and things which the company may think conducive to the objects aforesaid or the original objects of the company or any of them." "To do all such other things as are incidental or conducive to the attainment of the above objects or any of them or such other things as the company may from time to time determine upon."

But the only object which refers to a dealing with uncalled capital is one enabling the company to borrow and secure money upon its property present and future, including uncalled capital.

The primary meaning of such expressions as "property of the company," "real or personal estate," and "property and the undertaking of the company" does not extend to uncalled capital. The liability of a member holding shares not fully paid up to contribute when called upon by the directors pursuant to the articles or in the event of a winding up may constitute a right or asset of the company, but it does not form part of its undertaking or of its property, and it is not an estate (*Stanley's Case* (1); *King* v. *Marshall* (2); *In re Sankey Brook Coal Co.* [*No.* 2] (3); *Bank of South Australia* v. *Abrahams* (4); *In re Colonial Trusts Corporation*; *Ex parte Bradshaw* (5); *In re Streatham and General Estates Co.* (6); *In re Russian Spratts Patent Ltd.*; *Johnson* v. *Russian Spratts Patent Ltd.* (7); *Re Andrew Handyside & Co.* (8)). It follows that the powers stated above which relate to the disposal of property and undertaking are in themselves insufficient authority for those parts of the agreement which deal with uncalled capital. I do not think any of the three "incidental" powers set out add enough to authorize what has been done. The subject matter of the other objects being thus fixed by definition, I do not think that the "incidental" objects do more than enlarge the capacity of the company to act in relation to that subject matter. Some clearer indication of intention to empower a disposition or other transaction affecting uncalled capital, and, consequentially, the position of contributing shareholders, appears to me to be needed. The agreement provides by clause 15 that the directors of the new company may from time to time as they consider necessary call on the promoting companies respectively *pari passu* to make such calls on uncalled capital as may be determined (which I take to mean determined by the new company's board). The clause proceeds to provide that the net sums realized from the calls shall be transferred to the new company which shall issue fully paid shares to the amount received.

(1) (1864) 4 DeG.J. & S. 407; 46 E.R. 976.
(2) (1864) 33 Beav. 565; 55 E.R. 488.
(3) (1870) L.R. 10 Eq. 381.
(4) (1875) L.R. 6 P.C. 265.
(5) (1879) 15 Ch. D. 465.
(6) (1897) 1 Ch. 15.
(7) (1898) 2 Ch. 149.
(8) (1911) 131 L.T. Jo. 125.

H. C. OF A. 1934.

CITIZENS AND GRAZIERS' LIFE ASSURANCE CO. LTD. v. COMMONWEALTH LIFE (AMALGAMATED) ASSURANCES LTD.

DIXON J.

The articles of association of the Citizens and Graziers' Co. vest in the directors general authority to exercise the powers of the company, and I should think that if any special or particular object of the company covered a transaction with uncalled capital, as, for instance, the power to borrow does, the directors would thus be enabled to carry it into effect, notwithstanding that the articles confide to them the discretionary power of making calls. But some relevant power to deal with uncalled capital is necessary to confer upon the company authority to undertake contractually the obligations and submit to the control involved in the provisions of the fifteenth clause. I do not think the objects I have dealt with contain such a power. An attempt was made to support the clause as incidental to the following object: "To take or otherwise acquire and hold shares in any other company having objects altogether or in part similar to those of this company or carrying on any business capable of being conducted so as directly or indirectly to benefit this company." It was said that it was no more than giving an option to the new company to allot its unissued capital, and securing the amount which would become payable for the shares over the uncalled capital. I doubt whether the object, with the incidental power, would extend to such a transaction, but, in any event, it is not the transaction contained in clause 15, which gives rather an option over the uncalled capital of the Citizens and Graziers' Co., the price being payable in shares. In my opinion clause 15 of the agreement is not binding upon the Citizens and Graziers' Co. This conclusion does not involve the consequence that the whole transaction is *ultra vires*. Clause 15 is a distinct provision and no other provision is dependent for its operation or effect upon clause 15. The shares of the new company to be issued in respect of the proceeds of the calls are a separate and complete consideration for the moneys receivable under clause 15. Its provisions operate only after the businesses have been transferred. There is much to be said for the view that clause 15 is severable. But the result upon this suit of the conclusion I have reached would be that it should fail.

In my opinion the appeal should be allowed with costs, and the suit dismissed with costs.

McTIERNAN J. I have had the advantage of reading the judgment of my brother *Dixon* and agree with it.

In my opinion the appeal should be allowed with costs, and the suit dismissed with costs.

Appeal allowed with costs. Suit dismissed with costs.

Solicitor for the appellant, *N. K. P. Cohen.*

Solicitors for the respondent The Citizens and Graziers' Life Assurance Co. Ltd., *Pigott, Stinson, McGregor & Palmer.*

Solicitor for the respondent The Commonwealth Life Assurance Society Ltd., *G. W. Mitchell.*

J. B.

Dist *Liosatos v Australian National Line* (1964) 111 CLR 282

[HIGH COURT OF AUSTRALIA.]

BURNS PHILP & COMPANY LIMITED . . APPELLANT; DEFENDANT,

AND

MYRHE . . . . . RESPONDENT. PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Shipping and Navigation—Seaman incapacitated by illness—Articles of agreement—Illness contracted on board of the ship or in the service of the ship or her owner—Seaman employed by same owner for successive voyages—Separate articles signed for each voyage—Illness contracted during currency of articles for previous voyage—Effect.

The articles of agreement under which a seaman was employed by a shipowner contained a clause which provided that if the seaman were landed and left at a port by reason of illness or accident in the service of the ship incapacitating him from duty, he was entitled to certain wages and benefits. The clause